literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers"). Companies have a duty to correct and update prior material public statements that have become inaccurate or misleading. Courts consistently have held that, once a company speaks, it must tell the truth and update the facts to insure that the marketplace is not misled. See Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 163 (2d Cir. 1980) (company has a duty to correct prior material statements that have become inaccurate); In re Warner Communications Secs. Litig., 618 F. Supp. 735, 752 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) (same).

Moreover, even accepting the Second Circuit's characterization of defendants' statements as "forward-looking" or projections, the court below

erred in holding that these statements were not actionable under Rule 10b-5. The federal securities laws do not protect public statements only when they constitute "definite positive projections." Notably, the Second Circuit cited not a single case that supports such a proposition. To the contrary, courts have squarely held that forecasts, projections and general statements of optimism are actionable under the federal securities laws. See, e.g., In re Apple Computer Secs. Litig., 886 F.2d 1109 (9th Cir. 1989), cert. denied 110 S. Ct. 3229 (1990) ("projections and general statements of optimism may be actionable under the federal securities laws"[emphasis added]); Hanon v. Dataproducts Corp., 976 F.2d 497 (9th Cir. 1992) (same).

Courts have thus consistently rejected the argument that forward-

looking statements are not actionable because they are vague, conclusory or constitute corporate "puffing."[2] Thus, this Court has expressly held that statements may be actionable under the federal securities laws, "even when stated in conclusory terms." Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749, 2758-59 (1991). Similarly, as held in Midlantic Corporation Shareholder Litig., 758 F. Supp. 226, 232 (D.N.J. 1990), a company and its management cannot exploit their own public statements by challenging them as "vague" after injured investors assert that those statements were false and misleading.

> To hold otherwise would allow corporations and ... management to issue statements calculated to

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[2] See, e.g., Hoxworth v. Blinder Robinson & Co., 903 F.2d 186 (3d Cir. 1990); Mayer v. Mylod, 988 F.2d 635 (6th Cir. 1993); In re Meridian Secs. Litig., 772 F. Supp. 223, 226 (E.D. Pa. 1991).

> mislead investors by couching them with glowing yet relatively vague language, knowing full well that the investing public would attach to them meanings inducing them to invest in a corporation they otherwise would avoid.

Here, defendants disseminated a stream of public statements concerning and updating the status of their strategic alliance negotiations that became increasingly positive and definitive during the class period.[3] As demonstrated above, those statements may be actionable under the federal

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[3] As noted in petitioner's opening brief, the Second Circuit itself accepted as true the proposition that defendants conveyed "positive messages" regarding defendants' search for strategic alliances and the "consummation" of significant partnerships (Pet. 17a). The District Court similarly found that defendants' statements concerning strategic alliances were designed to "drum up enthusiasm" for Time Warner stock "by proclaiming the advantages possible 'strategic alliances' could offer the company and its would-be partners and by reporting that negotiations were underway" (Pet. 55a).

securities laws, irrespective of whether they constituted "definite positive projections." The Second Circuit's dismissal on this basis was therefore erroneous and in clear conflict with authorities from this Court and other Circuits.

Cross-respondents' opposition to the cross-petition is devoted principally to a verbatim recitation of the Second Circuit's opinion. Moreover, notably absent from cross-respondents' brief is any attempt to legitimize the Second Circuit's apparent limitation of liability under the federal securities laws only to "definite positive projections."

Cross-respondents also fail to credibly reconcile the Second Circuit's ruling with this Court's holding in Virginia Bankshares. That decision is inapposite, cross-respondents maintain,

because here, the "views expressed by defendants did not lack a factual basis, nor was it alleged that defendants did not believe the statements when made." Br. at 5, 6.[4] Not only are these factual assertions inappropriate in the context of a motion to dismiss, they avoid the central point of this Court's decision in Virginia Bankshares with regard to the actionability of the challenged statements in this case; i.e., that publicly disseminated statements may subject the speaker to liability even if made in general, vague and conclusory terms. The Second Circuit's dismissal of the statements challenged here directly conflicts with this controlling legal principle.

The Second Circuit's dismissal of the pre-May 1, 1991, statements was

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[4] Citations to cross-respondents' brief in opposition are in this form.

erroneous for another reason as well. Ultimately, the Court concluded that defendants' statements regarding strategic alliances did not become "materially misleading when the talks did not proceed well" (Pet. 26a). The Court thus made a decidedly factual determination regarding the materiality of information that was fundamentally improper on a motion to dismiss based on the adequacy of the pleadings.

A fact is material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). See also Basic, Inc., 485 U.S. at 231 (adopting the TSC Industries, Inc. standard in the § 10(b) and Rule 10b-5 context). Such questions are decidedly factual in nature and are

therefore reserved for the trier of fact.[5] In rendering its decision, therefore, the Second Circuit effectively arrogated to itself a function more properly left for the jury on a full and complete record. For this reason as well, the Second Circuit committed reversible error.

## II.

## STATEMENTS MADE BY UNIDENTIFIED CORPORATE "SPOKESPERSONS" TO JOURNALISTS AND ANALYSTS ARE ACTIONABLE UNDER SECTION 10(B)

Defendants' opposition is equally unpersuasive concerning statements by unidentified corporate "spokespersons" to the news media and financial analysts.[6] Although it recognized the

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[5] Brickman v. Tyco Toys, Inc., 731 F. Supp. 101, 104 (S.D.N.Y. 1990) ("The materiality of undisclosed information to investors is generally an issue for the trier of fact to ascertain").

[6] Plaintiffs are not -- as defendants assert, (Br. at 6) -- relying on statements made by newspaper

(continued...)

potency of these statements by stating that some "would bolster plaintiffs' case considerably," (Pet. 21a), the Second Circuit dismissed these claims pursuant to Rule 9(b) of the Federal Rules of Civil Procedure reasoning that plaintiffs were required, without the benefit of discovery, to plead the names of the spokespersons who made the statements.

In defense of the Second Circuit's decision, defendants argue that the opinion below does not create a split among the Circuits and, therefore, does not merit review by this Court. In fact, however, the Second Circuit's

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[6](...continued)
reporters and financial analysts. The complaint alleges that defendants themselves made misleading statements concerning Time Warner's strategic alliance negotiations to the financial media and securities analysts with the explicit knowledge and intent that they would be given the widest possible dissemination by these organizations.

stated rationale for precluding litigation based upon statements by "unidentified" company spokespersons -- that investors do not rely upon information that cannot be attributed to a named individual within the company -- is at odds with the decisions of several other Circuits which correctly recognize the power of such media reports to affect the market's perception of a company's worth. For example, both the Fourth and Ninth Circuits have granted summary judgment dismissing Rule 10b-5 claims on the grounds that negative press reports disclosed the facts plaintiffs had claimed the defendants wrongfully withheld from investors. See Cooke v. Manufactured Homes, Inc., 998 F.2d 1256, 1262 (4th Cir. 1993); In re Apple Computer Secs. Litig., 886 F.2d 1109, 1116 (9th Cir. 1989), cert.

denied, 496 U.S. 943 (1990).[7] If such press reports can exculpate defendants from Rule 10b-5 liability they also must provide a basis for such liability in appropriate cases.[8]

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[7]Indeed, there are conflicting decisions within the Fourth Circuit with respect to this issue. The decision of the panel in Raab v. General Physics Corp., 4 F.3d 286 (4th Cir. 1993), cited by defendants, holding that unattributed statements in news and analyst reports cannot provide basis for 10b-5 liability is inconsistent with Cooke's holding that statements by the media and financial analysts constitute notice to the market.

[8]The "long line of unbroken precedents" cited by defendants, Br. at 7, is neither long nor unbroken. In their opening brief, plaintiffs cited four decisions that expressly recognized that a corporation can be held liable for statements by unidentified spokespersons. On the other hand, three of the six decisions cited by defendants do not support the Second Circuit's decision on this issue. State Teachers Retirement Board v. Fluor Corp., 654 F.2d 843 (2d Cir. 1981), does not even address this issue. In re Verifone Secs. Litig., 11 F.3d 865, 871 n.8 (9th Cir. 1993), the Ninth Circuit explicitly declined to reach the company's argument that it could not be charged with any misstatements or omissions in analyst

(continued...)

Finally, defendants' in terrorem argument that permitting plaintiffs to take limited discovery with respect to the identities of the unidentified spokespersons will open the floodgates and invite frivolous litigation completely ignores the good-faith basis for plaintiffs' allegations in this case that the challenged statements did indeed originate within Time Warner. All of these statements were perfectly consistent with statements by the company and its senior officers and

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[8](...continued)
reports since it found that the challenged statements were not otherwise actionable under the federal securities laws. Finally, in Schwartz v. Novo Industri, A/S, 658 F. Supp. 795, 799 (S.D.N.Y. 1987), the court did not hold that the statement reported by the media was not actionable because it was unattributed (it was in fact attributed to the company's president), but because it was a projection and plaintiff had failed to allege facts demonstrating that the defendants did not have a reasonable basis for making the projection.

directors in SEC filings, annual reports, and elsewhere.

**CONCLUSION**

For all the reasons set forth above and in plaintiffs' conditional cross-petition, the conditional cross-petition for a writ of certiorari should be granted if the Court grants defendants' petition for a writ of certiorari.

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